A1

DECISION AND ORDER

GRANTING DEFENDANT'S MOTION TO

DISMISS FOR LACK OF JURISDICTION

(Filed May 16, 1980)

Civil No. 79-0264

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

UNITED STATES ex rel. JAKE LAPIN,

Plaintiff

v.

INTERNATIONAL BUSINESS MACHINES CORP.

Defendant

SAMUEL P. KING, District Judge

Plaintiff-Relator Jake Lapin filed this qui tam suit on behalf of himself and of the United States against International Business Machines Corporation ("IBM") pursuant to the False Claims Act, 31 U.S.C. 231 et seq., alleging that IBM made false claims upon the Government of the United States in the form of "provisional overbillings" and seeking to

assess against Defendant IBM double damages and a $2,000 fine pursuant to section 231.

The case is presently before this Court on Defendant IBM's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) on the ground that this Court lacks subject matter jurisdiction. After considering the briefs of counsel and oral argument of March 17, 1980, this Court grants Defendant's Motion to Dismiss.

FACTUAL BACKGROUND

On June 15, 1979, Plaintiff-Relator Lapin filed pro se a qui tam action pursuant to the False Claims Act, 31 U.S.C. 231 et seq., against IBM. Lapin then obtained counsel and filed on December 26, 1979, a First Amended Complaint and on March 14, 1980, an Affidavit concerning the allegations

in his original pro se complaint.

In his First Amended Complaint and his Affidavit, Lapin states that he became aware of the contractual arrangements between the United States and IBM that are the subject of this suit while he was a government employee. He alleges that since around 1973 various agencies of the United States Government have entered into yearly written contracts with IBM (the standard form of which is exemplified by Contract GS-00C-01522) pursuant to which the Government leases automatic data processing equipment. These contracts provide that IBM will make billings from the installation date of the equipment, but that the billings are subject to subsequent adjustment if the equipment does not perform at the requisite level. Specifically, should there be any interval

between installation and the onset of the equipment's "successful performance period" (a period of 30 or 90 days, depending on the model of the equipment, during which the equipment performs at an effectiveness level of at least 90%), then the Government is entitled, upon application, to a refund for the lease rent billed by IBM for that interval. Lapin contends that the Government does not maintain the records necessary to make application for refunds for these alleged "provisional overbillings," that it has rarely applied for such refunds, and that he suspects that the Government is entitled to refunds that it does not know about and has not claimed. Lapin states that he told various agencies of the Government his suspicions, but that they took no action.

He further claims that only IBM has access to the information necessary to determine the amount of the "provisional overbillings."

In Counts I through VI of his First Amended Complaint, Lapin alleges that the "provisional overbillings" constitute "false claims" under 31 U.S.C. 231. Counts VII and VIII of the First Amended Complaint add federal and state causes of action for "deceptive practices in commerce." In Count VII Lapin alleges that the "provisional overbillings" were in violation of the Federal Trade Commission Act, 15 U.S.C. 45 et seq., apparently asserting jurisdiction based on section 4 of the Clayton Act, 15 U.S.C. 15. Count VIII is a pendent state claim in which Lapin alleges that the "provisional overbillings" were in

violation of Chapters 480, 481, and 481A of the Hawaii Revised Statutes.

The False Claims Act, 31 U.S.C. 231 et seq., establishes a cause of action against persons making false claims upon the United States. Section 231 defines such claims and sets forth the liability of persons making those claims. Section 232 outlines the procedure for such suits; specifically, section 232(A) confers jurisdiction over such suits on the district courts, section 232(B) provides for qui tam suits, and section 232(C) allows the United States to enter appearance in and carry on such suits, provided that it is timely and diligent in doing so. Section 232(C) also deprives the district courts of jurisdiction in qui tam suits based on information in the possession of the United States.

On October 23, 1979, the United States, by an Acting Assistant Attorney General, filed a Report to the Court in which it declined to appear in this suit, stating its "opinion that its rights (could) be more effectively asserted under the contract and through administrative channels" and its concern that this Court may lack subject matter jurisdiction. The United States requests, however, that any dismissal by this Court be made without prejudice to its right to bring suit at a later date.

Defendant IBM filed a Motion to Dismiss the original Complaint on August 7, 1979, and a Motion to Dismiss the First Amended Complaint on January 7, 1980, on the ground that this Court has no jurisdiction in this case.

ISSUES PRESENTED

Defendant IBM contends that under section 232(C) this Court has no jurisdiction over the "false claims" counts in this case. IBM makes three arguments in support of this contention: first, that the United States had information sufficient to enable it to bring this suit at the time Lapin filed it; second, that Lapin disclosed to the United States the information upon which he bases his suit before he filed it, and hence the information was in the possession of the United States at the time this suit was filed; and third, that Lapin learned of the information upon which he bases his suit as a government employee. IBM also contends that Lapin has no standing to bring the federal "deceptive practices" count, and that therefore this Court has

no jurisdiction over the pendent state "deceptive practices" count.

Lapin, after obtaining counsel, argues on analogy to Federal Rule of Civil Procedure 56(f) that this Court should not conclude that it does not have jurisdiction in this case until it permits Plaintiff-Relator to discover information known to IBM but not to Lapin or the United States.

RULING

Section 232(C) of the False Claims Act, 31 U.S.C. 231 et seq., deprives this Court of jurisdiction in suits based on information already in the possession of the United States at the time the suit is brought. Plaintiff-Relator in this case makes no allegation that his suit is based on information beyond that he

gave the Government before he brought this suit. Hence, section 232(C) deprives this Court of jurisdiction.

Jurisdiction over the "false claims" counts in this case must derive from the jurisdictional grant in section 232. Subsection (A) grants district courts jurisdiction over section 231 suits generally, whether the suit is brought by the United States or brought under subsection (B) as a qui tam suit by a relator "as well for himself as for the United States . . . ." Subsection (C) makes further provisions regarding qui tam suits:

> Whenever any such suit shall be brought by any person under clause (B) of this section notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending by registered

mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit. Provided, That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance

> with clause (B) of this section.

Thus, if the United States wants to carry on the suit, it must enter the suit in a timely fashion and pursue it diligently; if it fails to do so, the relator may carry on the suit. Inaction by the United States does not affect the jurisdiction of the district court.

This was the extent of section 232(C) prior to the 1943 amendment, 57 Stat. 608, which added the following language:

> The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought . . . .

The Ninth Circuit reviewed the legis-

lative history of the 1943 amendment to section 232(C) in Pettis ex rel. United States v. Morrison-Knudsen Co., 577 F.2d 668 (9th Cir. 1978):

> Early in 1943 the Supreme Court held, under the then existing version of the False Claims Act, which had its origin in the Act of March 2, 1863, 12 Stat. 696, c. 67, that a qui tam or informer action could be maintained by a private person on behalf of the United States even when based solely on information acquired from an indictment. United States ex rel. Marcus v. Hess, 317 U.S. 537, 545-48, 63 S.Ct. 379, 87 L.Ed. 443 (1943). The immediate concern of Congress was to do away with these so-called 'parisitical suits.' United States v. Pittman, 151 F.2d 851, 854 (5th Cir. 1945), cert. denied, 328 U.S. 843, 66 S.Ct. 1022, 90 L.Ed. 1617 (1946); United States v. Rippetoe, 178 F.2d 735, 736 (4th Cir. 1949).

Id. at 671. Congress was loathe to have plaintiff-relators receive compensation under section 232(E) for bringing suits based on information that already had

been gathered by the Government in the course of law enforcement.

The 1943 amendment pertains to circumstances that in all respects parallel the circumstances covered by the original section 232(C) except that the informer has gone first to the United States with information, yet the amendment does not place the parallel requirement on the United States that it bring the suit in a timely fashion and pursue it diligently. Nor does it allow the suit to be brought by the informer if the United States does not bring suit itself. Instead, if the qui tam suit is based on information already in the United States' possession, the amendment completely deprives the district courts of jurisdiction. The face of the amendment evidences no concern as to whether or not there is a suit filed

regarding the alleged false claims; rather, it leaves entirely in the hands of the United States the decision as to whether and how vigorously to proceed on the information.

The debate over the amendment in the House of Representatives evidences possible confusion on this very issue, as the court in Pettis noted:

> MR. KEFAUVER. In the second place, if he has information and he gives it to the Government, and the Government does not proceed in due course, provision is made here where that suit can be brought and where he can get some compensation?
>
> MR. HANCOCK. That is correct.

89 Cong. Rec. 10849 (Dec. 17, 1943). 577 F.2d at 672. However, it is clear from the language of the statute that the informer who has turned over his information to the United States cannot bring

a suit under section 232 if the Government then fails to act. As the court in Pettis concluded:

> We have no doubt that under such circumstances the intent of Congress resides in the words of the statute. That is, discharge of our obligation to follow the intent of Congress requires that we assume that Congress said what it meant and meant what it said.

577 F.2d at 672.

Application of section 232(C) would seem most egregious in the case in which an honest informer reports information of a false claim to a government official who himself is involved in the fraud. The Fourth Circuit has carved an exception to the section 232(C) jurisdictional bar in just such a case, United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1949), reasoning that knowledge on the part of an agent engaged in an attempt to defraud his principal will not be imputed to the

principal and that, therefore, the United States does not possess the information. Plaintiff-Relator Lapin does not argue that the Rippetoe exception should apply in this case, nor does anything in the record suggest that to be appropriate. To the contrary, the United States' Report to the Court suggests that the Government is considering various avenues available to remedy any existing problems.

In Pettis, appellant-relator Pettis argued that there should be exceptions to section 232(C) jurisdictional bar for cases in which the Government's information had been supplied by the relator and for cases in which the relator had information beyond that in the possession of the Government. The court in Pettis refused to recognize the appellant's first proposed exception on the basis

of its reading of the statute in light of its legislative history, as discussed above. It also refused to recognize the appellant's second proposed exception on the facts in Pettis, although it refrained from stating a standard as to "the extent in which the information on which the suit is based must be identical to the information in the possession of the United States in order for the jurisdictional bar to be invoked." 577 F.2d at 674. In the instant case, Plaintiff-Relator Lapin does not even allege that he has more information than does the Government. There is, therefore, no room to argue the second exception in this case. Neither is there reason to delay ruling on the motion before this Court pending discovery, since it is not even alleged that such discovery would show that

Plaintiff-Relator had more information than did the Government at the time suit was filed.

None of the possible exceptions to section 232(C) is applicable, and the language of section 232(C), as interpreted by the Ninth Circuit in the light of its legislative history, clearly deprives this Court of jurisdiction in this case in which Plaintiff-Relator Lapin has told the United States the suspicions upon which he bases his suit. Counts I through VI therefore must be dismissed for lack of jurisdiction.

Lapin also alleges federal and state "deceptive practices" claims, apparently basing jurisdiction on section 4 of the Clayton Act, 15 U.S.C. 15. However, Lapin has no standing to assert a claim on behalf of the United States under the

antitrust laws. Insofar as the United States has been harmed, "under section 4 of the Act, . . . it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under (this law)." United States v. Borden Co., 347 U.S. 514, 518, 74 S.Ct. 703, 98 L.Ed. 903 (1954). Section 4 of the Clayton Act makes no provision for qui tam actions. In any event, section 4 does not confer jurisdiction over suits for violations of the Federal Trade Commission Act. The Federal Trade Commission Act makes no provision for a private right of action, either explicit or implicit; "the Act vests initial remedial power solely in the Federal Trade Commission." Carlson v. Coca-Cola Company, 483 F.2d 278, 280 (9th Cir. 1973) (citations omitted).

Accordingly, Count VII must be dismissed.

This Court thus has no jurisdiction over Plaintiff's federal claims and therefore must dismiss Count VIII, Plaintiff's pendent state claim.

IT IS HEREBY ORDERED that Defendant IBM's Motion to Dismiss is GRANTED, without prejudice to the right of the United States to assert on its own behalf the allegations contained in this case.

DATED: Honolulu, Hawaii, May 16, 1980.

/s/ SAMUEL P. KING
United States District Judge

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(Filed February 26, 1982)

No. 80-4312

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES ex rel. JAKE LAPIN

Plaintiff-Appellant

v.

INTERNATIONAL BUSINESS MACHINES CORP.

Defendant-Appellee

BEFORE: BROWNING, Chief Judge; SKOFIL and NORRIS, Circuit Judges

Lapin filed a qui tam action on behalf of himself and the United States under the False Claims Act, 31 U.S.C. 231, et seq. He appeals the district court's dismissal of the action for lack

of subject matter jurisdiction, 31 U.S.C. 232(C). We affirm.

The trial court did not err in dismissing Lapin's action. It properly found that when a citizen's qui tam suit is based upon information "in the possession of the United States, or any agency, officer or employer thereof, at the time such suit was brought," the district court has no jurisdiction to proceed. 31 U.S.C. 232(C). See Pettis ex rel. United States v. Morrison-Knudsen Co., 577 F.2d 668, 670-73 (9th Cir. 1978). See also United States v. Florida, 615 F.2d 1370 (5th Cir. 1980); Safir v. Blackwell, 579 F.2d 742 (2d Cir.), cert. denied, 441 U.S. 943 (1978); United States v. Aster, 275 F.2d 281 (3d Cir.), cert. denied, 364 U.S. 894 (1960). Compare United States ex rel.

Joseph v. Cannon, 642 F.2d 1373, 1378 (D.C. Cir. 1981). Lapin's attempt to characterize information held by the Government as mere suspicions rather than hard evidence, must fail. The record reflects that the "evidence and information in possession of the United States at the time the False Claims Act suit was brought was sufficient to enable it adequately to investigate the case and to make a decision whether to prosecute." Pettis ex rel. United States v. Morrison-Knudsen Co., supra, 577 F.2d at 673.

AFFIRMED.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING MOTION FOR REHEARING

(Filed April 28, 1982)

No. 80-4312

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES ex rel. JAKE LAPIN

Appellant

v.

INTERNATIONAL BUSINESS MACHINES CORP.

Appellee

Appeal from the United States District Court for the District of Hawaii
Samuel P. King, District Judge, Presiding

BEFORE: BROWNING, Chief Judge, SKIPIL and NORRIS, Circuit Judges

The panel has voted to deny the petition for rehearing.

The petition for rehearing is denied.

A27

PREFILING DISCLOSURES OF INFORMATION

TO GOVERNMENT BY RELATOR

June 6, 1979

MEMORANDUM TO: Messrs. Walter Heen

and Michael Setrrett

SUBJECT: Unjust enrichment to IBM at

taxpayers expense

This memorandum is to confirm my recent oral report to you about a $56,000 refund due CINCPAC by IBM because of certain authorized overbilling practices that had not been adjusted at the time an IBM model 360/50 rental computer was rendered operational after completion of the prerequisite period of satisfactory performance. For certain reasons unknown to me I was physically transferred from Honolulu to Arlington, Virginia before I had the opportunity to determine whether IBM actually refunded CINCPAC the $56,000

overpayment I detected. Presently, Mr. George Miyashiro, IBM Administration Operations Manager in Honolulu, will not tell me whether IBM actually made the refund to CINCPAC.

What is of even more fundamental importance is the fact that had I been allowed to pursue this matter (follow the string) in lieu of being involuntarily transferred, I believe I could have identified about $56 million in over-billings per 1,000 IBM 360/50 rental computers. Furthermore, I would have definitely recommended that IBM be contractually held accountable and responsible for ensuring that adjustment is made for those authorized provisional overbillings.

I have already reported these conditions to both the GSA and GAO

through their respective hotlines. Also, I am ready, willing, and able to assist all federal agencies in determining whether they are entitled to such refunds. I would appreciate it if you would keep me advised as to the action, if any, that is being taken to get these refunds.

Sincerely yours,

/s/ JAKE LAPIN

P. O. Box 23334

Honolulu, Hawaii 96822

A30

AFFIDAVIT OF RELATOR'S SUPERVISOR

INCLUDED IN THE PLEADINGS

STATE OF HAWAII)
)
CITY AND COUNTY OF HONOLULU)

Charles O. Shelton, Jr., being first duly sworn, on oath, deposes and says:

1. That I was the immediate supervisor of the Plaintiff Lapin from April 1966 to January 1969 when he was employed at the Defense Audit Office Honolulu and that during January 1969, the Plaintiff was involuntarily transferred to Arlington, Virginia under a new employment agreeement;

2. That prior to such involuntary transfer, a Major Plaskett, who was the CINCPAC Deputy Computer Officer, contacted his son's godfather, GS-15 Arthur Goldstein, who was employed by

the Defense Audit Service in Washington, D. C. and discussed the Plaintiff's performance on the CINCPAC Computer Audit underway;

3. That as a direct result of GS-15 Arthur Goldstein's intervention, my supervisor in Washington, D. C., GS-16 Seymour Rubin, directed me, in writing, to investigate the desirability of removing the Plaintiff Lapin from the audit because of alleged incompetence and/or unsuitability;

4. That I performed the required investigation and submitted a written report that there was no reason to remove Mr. Lapin from the CINCPAC Computer Audit; and

5. That Mr. Lapin was physically removed from Honolulu before his audit report was published, and thus he was

precluded from ever determining whether a $56,000 overpayment to IBM that he detected was ever refunded to CINCPAC.

/s/ CHARLES O. SHELTON

Subscribed and sworn to before me this 5th day of June, 1979.

/s/ MARJORIE TAM

Notary Public, First Circuit Court
State of Hawaii

My Commission Expires: 3/7/80

RELATOR'S ORIGINAL INFORMATION THAT WAS PROVIDED TO DISTRICT COURT

1. The Government does not maintain centralized records showing the identity of each federal agency renting a computer from IBM under the IBM ADP Schedule Pricelist.

2. The various federal agencies renting computers from IBM under the ADP Schedule Pricelists do not maintain records showing installation date of computer and date the acceptable performance period was attained.

3. IBM bills the federal agencies renting computers from it in an amount in excess of that actually chargeable under law.

4. IBM commences to bill the Government for computer rentals prior to the

date such computers were accepted by the Government as being fully operational.

5. IBM will not disclose its knowledge to the Government regarding overbillings.

6. IBM maintains centralized records pertaining to individual computer rentals which can be used to identify and compute overbillings.

7. IBM advised the Plaintiff-Relator that it was not its policy to voluntarily refund overpayments by the Government.

8. IBM will only make refunds of overbillings on the basis of formal claims that must be supported by detailed records maintained by the Government.

9. Practically all Government employees responsible for certifying IBM invoices for computer rentals do not

understand the billing provisions included in the annual IBM ADP Schedule Pricelists or recognize the IBM requirement to maintain special records for the purpose of claiming refunds for prior overbillings as being a valid one.

10. IBM does not certify that its annual ADP Schedule Pricelists conform to the requirements of the contract (the General and Special Provisions as well as the terms and conditions in the Solicitation, Offer and Award).

11. IBM's annual ADP Schedule Pricelists authorize billing procedures that are in violation of those prescribed by the General and Special Provisions as well as the terms and conditions in the Solicitation, Offer and Award. . . .